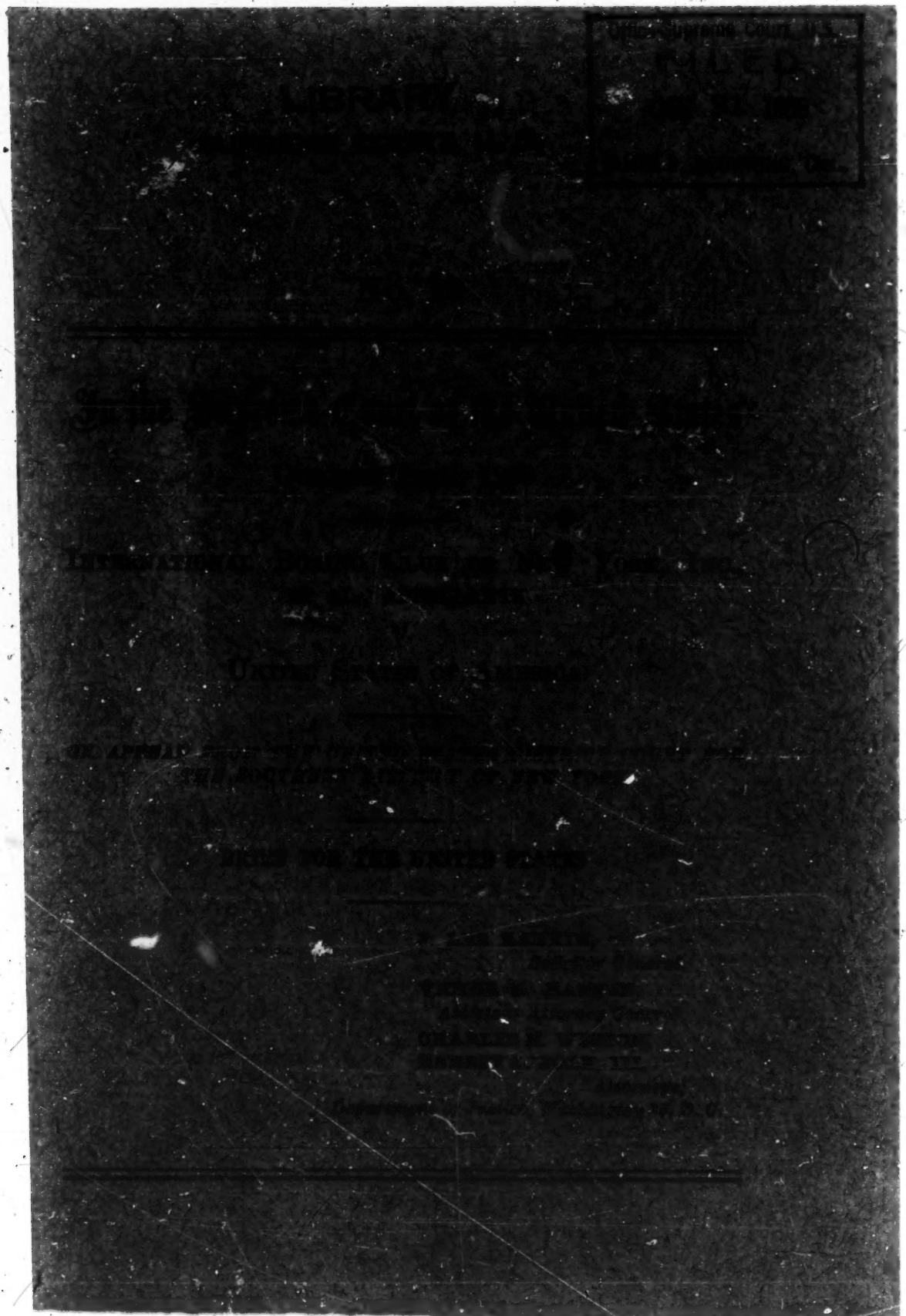

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 18

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion rendered by the district court on the merits (R. 550–596) is reported in 150 F. Supp. 397, and its opinion on relief (R. 890–7) has not been reported.[1]

JURISDICTION

The final judgment of the district court was entered on July 2, 1957 (R. 906–915), and a timely motion for rehearing and new trial was denied on August 27,

[1] The opinion of this Court reversing the district court's judgment dismissing the complaint for failure to state a cause of action is reported in 348 U. S. 236.

1957 (R. 926). Notice of appeal was filed on October 14, 1957, and this Court noted probable jurisdiction of the appeal on March 17, 1958 (R. 1595). 356 U. S. 910. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended.

QUESTIONS PRESENTED

1. Whether the district court's findings that appellants have conspired to restrain and to monopolize interstate trade and commerce are clearly erroneous.

2. Whether appellants' conspiracy was in unreasonable and unlawful restraint of trade.

3. Whether their conspiracy to obtain power to exclude competitors and to control price, in the promotion of world championship boxing contests, and their possession of such power, constitute a conspiracy to monopolize and a monopolization of trade and commerce prohibited by Section 2 of the Sherman Act.

4. Whether the district court, in granting the relief which it incorporated in its judgment, exceeded the limits of the discretion vested in it respecting determination of the relief appropriate and necessary to safeguard against continuation of appellants' unlawful conduct and to extirpate the consequences thereof so far as practicable.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, as amended, known as the Sherman Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in

restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 1.]

SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 2.]

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *. [15 U. S. C. 4.]

STATEMENT

The complaint filed by the United States in March 1952 charged that since about January 1949 the appellants have been engaged in a combination and conspiracy in unreasonable restraint of trade and commerce among the states in the promotion, broadcasting, and televising of professional world championship boxing contests in the United States, and have been engaged in a conspiracy to monopolize, and

have monopolized, this trade and commerce, in violation of Sections 1 and 2 of the Sherman Act (R. 7). The defendants named in the complaint (the present appellants) were: International Boxing Club, Inc., an Illinois corporation ("IBC (Ill.)"); International Boxing Club of New York, Inc., a New York corporation ("IBC (N. Y.)"); the Madison Square Garden Corporation ("the Garden"); and two individuals, James D. Norris and Arthur M. Wirtz.

In February 1954 the district court dismissed the complaint upon the ground that the Sherman Act does not apply to professional boxing, but this Court reversed, holding that "the complaint states a cause of action and that the Government is entitled to an opportunity to prove its allegations." 348 U. S. 236, 245. The evidence submitted at the trial in April and May 1956 consisted of numerous exhibits (see R. 928–1575), answers to interrogatories and requests for admission (see R. 58–117, 123–126, 129–133), and extensive oral testimony (see R. 134–473). After the opposing parties had submitted proposed findings of fact and conclusions of law (R. 480–549), the district court in March 1957 filed its opinion (R. 550–596), in which it incorporated detailed findings of fact (R. 555–591) and its conclusions of law (R. 595–6).

The court entered its final judgment on July 2, 1957 (R. 906). Preceding the entry of judgment, the court received proposals and counterproposals, and heard lengthy testimony and argument of counsel respecting the relief to be granted (R. 596–890). The court also set forth the reasons for the conclusions which it had reached as to the judgment pro-

visions in an opinion rendered on June 24, 1957 (R. 891–7).

Although the facts to be considered on this appeal are those found by the district court, except any shown to be "clearly erroneous" (Rule 52 (a), Federal Rules of Civil Procedure), appellants, both in their statement and argument, almost wholly ignore the court's findings of fact. They rely, instead, on fragmentary evidentiary items culled from the three-volume printed record, without discussing the relation of the cited evidence to the court's findings.

The facts which we shall set forth are those found by the court, supplemented in some instances by reference to evidence which supports, clarifies, or amplifies the court's findings.

BASIC FACTS CONCERNING THE BOXING INDUSTRY

Professional boxing, including championship boxing, consists of a contest between two individuals in a suitable arena or stadium (Fdgs. 9–10, R. 558). Such a contest consisting of 4, 6, 8, 10, 12, or 15 rounds, is staged as part of a boxing "card" featuring a main event, which may be a championship bout (Fdgs. 14–15, R. 559–60). In all contests the boxers are matched according to fixed weight divisions,[2] in each of which there ordinarily is at any given time

[2] These are flyweight (to 112 lbs.), bantamweight (to 118 lbs.), featherweight (to 126 lbs.), lightweight (to 135 lbs.), welterweight (to 147 lbs.), middleweight (to 160 lbs.), light-heavyweight (to 175 lbs.), and heavyweight (over 170 lbs.), but the two lightest classes have "little practical importance" in the United States (Fdg. 11, R. 558).

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"one recognized world champion" (Fdgs. 11–12, R. 558). A boxer achieves the championship by defeating the existing champion or, if the champion retires or the title is otherwise vacated, by participating in title elimination contests (Fdg. 13, R. 559). The court found (Fdg. 12, R. 558–9):

> Recognition as a world champion is a lucrative asset to any professional boxer and attaining the world championship is generally sought by all professional boxers in the division in which they compete. It places the individual so recognized in a position to obtain more for his services than those who have not been so recognized. * * * There are other emoluments which come to the recognized world champion by way of commercial endorsements and advertising programs.

The trade and commerce involved in this suit is "the promoting and holding of professional championship boxing contests," including the sale of television, radio, and film rights to such contests (Fdgs. 24–26, R. 562). Of the 44 title contests held in the United States between June 1, 1949 and May 15, 1953, from which the total receipts were $8,759,326, appellants "promoted or had an interest in" 36, which produced a total revenue of $7,100,944, or over 81% of the gross revenue of all title contests during this period (Fdgs. 35, 38, R. 564–5).

BACKGROUND TO APPELLANTS' CONSPIRACY

For a number of years prior to January 1949, appellants Norris and Wirtz owned and operated arenas and stadia in Chicago, Detroit, and St. Louis (Fdgs.

93–95, 100, 148; R. 573, 574, 585). During this time they also owned, directly and indirectly, more than 50,000 shares of stock in the Garden (Fdg. 102, R. 575; R. 258),[3] which is the "foremost sports arena in New York City" (Fdg. 87, R. 572). New York City, in turn, is the "most important site in the United States for the staging of championship boxing contests,"[4] Chicago—and, to a lesser extent, Detroit and St. Louis—being also "important sites" for such contests (Fdgs. 152–153, R. 586).

For many years prior to 1949 boxing contests (both non-title and championship contests) staged at the Garden were promoted by Michael S. Jacobs through his organization Twentieth Century Sporting Club (collectively referred to herein as "Jacobs"), and in 1946 an exclusive lease of the Garden arena to Jacobs for boxing contests was renewed for a five-year term ending May 31, 1951 (Fdgs. 96–98, R. 574).[5] Jacobs' subsequent illness and inability personally to promote contests brought a decline in the Garden's boxing income, but the Garden's boxing revenues were "not substantially lower" except in comparison with "the peak years of 1946 and 1947" (Fdg. 99, R. 574; R. 242). Television was a "major factor" in the Garden's

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[3] As of April 16, 1955, Norris and Wirtz owned 219,450, or 38% of the 563,500 shares of Garden stock outstanding (R. 282).

[4] Appellant Wirtz testified that "New York is the boxing capital of the country and always will be until you split up these ten million people" (R. 294).

[5] Profits from such promotions were shared by Jacobs and the Garden "on a 50–50 basis" (Fdg. 96, R. 574), and the association had proved "reasonably successful" (R. 245).

decline in gate receipts, but beginning in 1947 and 1948 it was able to offset this loss to some extent by sale of television rights (Fdg. 92, R. 573).

In 1948 Norris and Wirtz became aware of the Garden's increasing difficulties in connection with boxing events (Fdg. 104, R. 575). Early in the summer of 1948 Wirtz spoke to the Garden's president Kilpatrick about information which Wirtz had received that Tournament of Champions ("T of C"), an organization principally sponsored by Columbia Broadcasting system ("CBS"), planned to "make a strong bid to tie-up the various boxing champions so they could control the television and broadcasting of the major boxing events with the long-range view of controlling boxing in the Garden" (GX 263, R. 1528-9). Wirtz therefore recommended "a program of getting together [with the Garden] on an agreement of our respective buildings and try to work out mutual protective agreements that might save this situation", and later in the summer of 1948 Norris met with Kilpatrick and "outlined practically the same program" (*id.*, R. 1529). Although Kilpatrick "recognized the merits of" these suggestions, he stated that the Garden's agreement with Jacobs prevented him from acting on them (*ibid.*).

FORMATION OF THE COMBINATION AND CONSPIRACY

Appellants' conspiracy had its inception in an agreement made in January 1949 between Norris and Wirtz and the then heavyweight champion of the world, Joe Louis. The agreement provided that Louis should enter into contracts with the four leading contenders

for his title vesting in Louis or his assignee the exclusive right to promote their professional boxing matches and all radio, television, and motion picture rights incident to these matches; that Louis then resign as heavyweight champion and assign the four exclusive contracts to a corporation to be formed by Norris and Wirtz; that Louis receive a stock interest in this corporation and be employed by it at an annual salary of $15,000; and that Louis be paid $150,000 (Fdg. 107, R. 576). By the end of March 1949 this agreement had been carried out. Louis (through a wholly owned company) had entered into the contemplated exclusive contracts with the four leading contenders; he had resigned as heavyweight champion; he had assigned the four exclusive contracts to IBC (Ill.), which Norris and Wirtz had organized for the purpose of promoting professional boxing contests in Illinois;* and he had been paid the agreed sum of $150,000 (Fdgs. 109–113, R. 577–8).

The exclusive contracts put Norris and Wirtz in a position to "promote boxing contests in which the heavyweight championship title would be at stake" (Fdg. 116, R. 579), and thus to compete with the Garden in the promotion of championship contests (Fdg. 124, R. 580). Wirtz in a letter to Kilpatrick, the Garden's president, in March 1949 explained that the

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*They also organized in March IBC (N. Y.) for the purpose of promoting championship boxing contests in New York, and IBC (Ill.) made plans for promoting championship contests in Michigan and Missouri through Michigan and Missouri corporations carrying the name "International Boxing Club, Inc." (Fdgs. 114–115, R. 578.)

belief that T of C "with their television hook-up would control fights unless we [had] stepped into the situation quickly" had prompted the agreement with Louis and organization of IBC (Ill.). (GX 263, R. 1531.) The letter referred to Wirtz's earlier suggestion that the Garden and the Norris-Wirtz interests "try to work out mutual protective agreements that might save this [boxing] situation" (*id.*, R. 1529); stated that the "policy of television companies in trying to control fights is a major threat to our business" (*id.*, R. 1531); and that it was apparent that "we should work together now * * * and not create a competitive situation which would be harmful to all" (*ibid.*). The letter concluded by asking Kilpatrick to explain the contents of Wirtz's letter to the Garden's board of directors "so they will fully understand our position" (*ibid.*).[7]

In mid-April Norris-Wirtz and the Garden negotiated regarding joint ownership of corporations to conduct boxing contests in the arenas which they respectively owned,[8] and these negotiations resulted in reaching an agreement early in May 1949 "to com-

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[7] Earlier in March an emissary to the Garden from Wirtz, discussing the question of an "alliance of boxing" as between Norris-Wirtz and the Garden, "[m]ade much of the fact that it was important to keep this [championship] fight away from the T of C and television people" (GX 262, R. 1527).

[8] A memorandum by a Garden representative on the "present status" (April 1949) of discussions between the Norris-Wirtz group and the Garden stated: "The advantages of a close association between Madison Square Garden and the important arenas controlled by Wirtz-Norris group were self-evident" (GX 267, R. 1537).

bine and join forces" (Fdg. 122, R. 580). The agreement provided that IBC (Ill.) and IBC (N. Y.) should have common board of directors consisting of Norris and Wirtz, two representatives of the Garden, and Joe Louis; that two-thirds of championship contests should be allocated to IBC (N. Y.) and one-third to IBC (Ill.); that Norris and Wirtz receive 80% of the profits of IBC (Ill.) and the Garden 80% of the profits of IBC (N. Y.), with Louis receiving the remaining 20% of the profits of each; and that the Garden contribute to the venture a sum substantially equal to the $150,000 paid by Norris and Wirtz to Louis (Fdgs. 123–124, R. 580).* The Garden's participation in the agreement was subject to its obtaining cancellation of its lease to Jacobs, and on May 5, 1949 it agreed to pay Jacobs $100,000 in consideration for cancellation of this lease (Fdg. 126, R. 580–1). A purpose of the agreement was to acquire and retain joint control by appellants of the promotion of championship contests and to exclude others, particularly telecasting companies, from promoting such contests (Fdg. 127, R. 581).

MONOPOLISTIC ELEMENTS OF THE COMBINATION AND CONSPIRACY

(1) EXCLUSION OF COMPETITORS

In early 1949 the only "significant" promoters of professional championship boxing contests in the

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*It was ultimately agreed that Norris-Wirtz and the Garden would share equally in the proceeds of championship bouts, an arrangement which facilitated staging a contest where it would bring the most money, without regard to any "artificial" one-third—two-thirds allocation of these bouts (R. 452).

United States, apart from appellants, were Jacobs and T of C (Fdg. 128, R. 581).

We have already mentioned the surrender obtained by appellants of Jacobs' exclusive lease of the Garden for presentation of professional boxing contests (*supra*, p. 11). Jacobs also had like exclusive leases for the Yankee Stadium and St. Nicholas Arena, both in New York City, and a contract for the exclusive services in title contests of the then welterweight champion (Fdgs. 129–130, R. 581). In May 1949 Jacobs agreed with the Garden to surrender to it these exclusive leases and his exclusive contract, and also agreed that for a period of ten years he would not promote any professional boxing matches in the United States or permit use of his name in this connection (Fdgs. 131–132, R. 581–2).

In May 1949 the Garden, as the result of negotiations carried on in accordance with an understanding with Norris and Wirtz, purchased all of the stock of T of C (Fdg. 144, R. 584). T of C, which was organized in 1947, promoted two middleweight championship contests in New Jersey in 1948, and in March 1949 it was negotiating both a welterweight and a middleweight championship fight to be staged at the Polo Grounds in the summer of 1949 (Fdgs. 134–135, 141; R. 582, 583). Although T of C had sustained increasing operating losses, the Garden paid it $100,000 for its stock and agreed to give it 25% of the net profits

of the next two middleweight championship contests promoted by appellants (Fdgs. 143–144, R. 584).[10]

Both the agreements with Jacobs and the purchase of T of C's stock were designed to and did eliminate them as competitors, and substantially lessened competition in the promotion of championship boxing contests (Fdgs. 133, 147; R. 582, 585).

(2) CONTROL OF STADIA AND ARENAS

In March 1949 appellants concluded that the pooling of the stadia and arenas which they controlled would be effective in excluding other promoters of championship boxing (Fdg. 159, R. 587), and the importance of the arenas controlled by Norris and Wirtz was "one reason which prompted the Garden to join with" them (Fdg. 149, R. 585), with the result that all other promoters have been excluded (Fdg. 160, R. 587). The district court found that throughout the complaint period appellants had control of "key stadia and arenas" for the staging of championship contests (Fdg. 158, R. 587).

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[10] By the purchase, the Garden also acquired from T of C its exclusive lease on the Polo grounds for promotion of boxing contests and its agreement with the then middleweight champion giving T of C the right to promote his next two middleweight championship contests (Fdgs. 139–140, R. 583; GX 39–40, R. 1075–82).

In connection with the purchase the Garden gave CBS (the principal stockholder of T of C) a five-year first refusal of radio and television rights for a weekly series of boxing contests at the Garden in consideration of CBS's five-year covenant not to invest in promoting or staging professional boxing matches (Fdg. 145, R. 584–5).

In New York City appellants acquired, besides the Garden itself, exclusive leases for boxing in Yankee Stadium, the St. Nicholas Arena, and the Polo Grounds (Fdgs. 150–151, R. 585–586).[11] During the years 1937–1948, 75% of all championship matches presented in New York City were staged at the Garden, and the remaining 25%, with one exception, at the Polo Grounds, Yankee Stadium, or St. Nicholas Arena (Fdg. 157, R. 586–7).

Appellants acquired control not only of the New York arenas but also of the principal arenas in Chicago, Detroit, and St. Louis already under Norris-Wirtz control (Fdg. 158, R. 587). As a result of this control, others have been excluded from promoting championship boxing contests (Fdg. 160, R. 587).

(3) EXCLUSIVE CONTRACTS WITH CHAMPIONS AND CONTENDERS

Appellants, as a part of their combination and conspiracy, required each contender in a championship contest which they promoted to enter into a contract providing that, if the contender won and became champion, he would for a period of three (or sometimes five) years engage solely in championship contests promoted by the appellants or their designees (Fdg. 161, R. 587). These contracts were a condition precedent to "having the opportunity to win a title"

[11] During the 1937–1948 period, the St. Nicholas Arena was the only indoor arena in New York other than the Garden used for promoting championship contests, and the Yankee Stadium and Polo Grounds are the most suitable outdoor stadia in the United States for staging championship contests (Fdgs. 154–155, R. 586).

(Fdg. 163, R. 588).[12] The contracts also gave radio, television, and motion picture rights exclusively to appellants (Fdg. 162, R. 588). Appellants' practice of obtaining such contingent exclusive contracts "served as a device for perpetuating their control of professional world championship contests as the title passed from one boxer to another" (Fdg. 164, R. 588).

(4) POWER TO EXCLUDE COMPETITORS OBTAINED BY COMBINATION

During the period June 16, 1949 (the date of the first championship contest promoted by appellants), through May 15, 1953,[13] there were 44 professional championship boxing contests promoted in the United States, and appellants promoted 25 of these contests and controlled the promotion of 11 others (Fdgs. 169–171, 173; R. 589–90). They thus controlled 36 of the 44 title bouts during this period, or approximately 81%. They obtained by their combination and conspiracy power to exclude others both from the promotion of championship boxing contests and also from sale of television, radio, and motion picture rights thereto; they combined and conspired to acquire this power; and they both intended to and did exclude

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[12] Norris admitted that in the period 1949 to 1953 it was the IBC's "normal procedure" to get such an exclusive contract from a contender "before he engages in a championship bout" (R. 348).

The co-manager of a French middleweight contender testified that in negotiating with IBC (N. Y.) for a championship contest, IBC demanded that he "either sign the exclusive or the boxer that I manage would never get a chance at the world's championship" (R. 195).

[13] As to this date, see paragraph 16 of the complaint as amended (R. 126).

others from such promotion and such television, radio, and motion picture rights (Fdgs. 168, 177–178; R. 589, 591).

MARKET RELEVANT TO CONSPIRACY TO MONOPOLIZE AND MONOPOLIZATION

There is a "particular and special demand" for television, radio, and motion-picture rights for championship boxing contests "in contradistinction to similar rights to non-championship contests," and "particular and special demand" by promoters and by spectators for the former contests "in contradistinction to" the latter (Fdgs. 61–62, 64, 66; R. 568–9). Appellants' average receipts from the former were $[illegible]4,000 and $40,000 from the latter, and their respective Nielsen television audience ratings were 74.9% and 57.7% (Fdgs 51, 54, R. 567). Appellants themselves recognized the "special attractiveness and peculiar qualities incident to the promotion of championship contests"; they allocated only these contests as between IBC (Ill.) and IBC (N. Y.) and their exclusive contracts with boxers were limited to championship contests (Fdgs. 57–58, R. 568).

Anyone who wishes to sponsor the telecasting of a show or event as a medium for advertising his products has a wide variety of choice (Fdg. 77, R. 570–1). But there is a viewer audience for championship boxing contests which is separate from the audience interested in viewing non-championship contests and other sports events (Fdg. 79, R. 571), and, for the sale of television rights, the former constitutes a

market "separate and distinct" from the latter (Fdg. 86, R. 572).

THE DISTRICT COURT'S OPINIONS

The opinion in which the court held that appellants had violated the Sherman Act noted that, under the findings which it had made, the evidence established the allegations of the Government's complaint and that this Court had previously held (348 U. S. 236) that these allegations set forth violation of the Sherman Act (R. 593–4). The court therefore primarily considered whether professional championship boxing contests or all boxing contests constitute the relevant market for determining appellants' possession of monopoly power bringing them within the prohibitions of Section 2 of the Act directed against conspiring to monopolize and monopolizing any part of interstate commerce (R. 591–3).

The court observed that in *United States* v. *du Pont & Co.*, 351 U. S. 377, this Court had held that the market to be considered in this connection comprises "products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered" (351 U. S. at 404), and that this is basically a factual determination to be resolved on the basis of the "varying circumstances of each case" (*id.* at 395). The court below held that its factual findings established that "championship contests are on a plane which clearly distinguishes them from non-championship fights" respecting both financial return and attractiveness to the public as a medium of entertainment (R. 593). The court therefore concluded

that promotion of championship boxing contests constitutes "a distinct, unique and relevant market for Sherman Act consideration (*ibid.*)."

In its opinion on relief (R. 891–7) the court found that a year after its adjudication that the Sherman Act was being violated appellants' combination "still exists and continues to function in only slightly altered form"; that its purposes and objectives "remain unchanged"; that Norris and Wirtz still control the Garden and "dictate its policies and boxing activities"; that the Garden has become the sole stockholder of IBC (N. Y.); that Norris and Wirtz are the sole stockholders of Chicago Stadium Corporation, which has become the sole stockholder of IBC (Ill.); that Norris is the president of the Garden, IBC (N. Y.), IBC (Ill.), and the Chicago Stadium Corporation, and that he and Wirtz are directors of all four corporations; that IBC (Ill.) and IBC (N. Y.) "still share the profits of championship contests as of old"; that appellants' combination "still possesses and exercises its monopolistic control in the field of championship contests"; and that appellants control television and radio rights to boxing contests staged in the arenas under their control (R. 892).

of the combination which will permit "reestablishment

The court concluded that there must be a dissolution of the competitive positions of the [appellants] and the entry of others into the market" (R. 891), and that such a dissolution can be accomplished only by "complete severance of the interlocking ownership of Norris and Wirtz in Madison Square Garden (R. 893). This relief, said the court, would open the way to competition for championship contests between the

Garden, on the one hand, and the Norris-Wirtz group, on the other hand (R. 894). Reasons given by the court for other judgment provisions which it found necessary or appropriate to effective relief will be referred to in the Argument in replying to appellants' contention that the relief decreed by the court is in various respects unduly drastic and essentially punitive.

SUMMARY OF ARGUMENT

I

1. Appellants, although asking this Court to reverse the findings of the district court that they had combined and conspired to restrain and to monopolize trade and commerce in the promotion of championship boxing contests, do not show or even attempt to show that the findings of combination and conspiracy lack evidentiary support and are "clearly erroneous." In effect, appellants are requesting this Court to try the case *de novo* on the record, to reject nearly all of the district court's findings, and to substitute its own contrary findings. In these circumstances, no foundation for reversal is laid. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, and cases cited *infra*, p. 23.

2. Appellants contend that, in any event, their combination and conspiracy is not in unreasonable and unlawful restraint of trade. Since this Court has held that the allegations of the complaint state a cause of action (*United States* v. *International Boxing Club*, 348 U. S. 236, 245), and since the district court has found that the evidence establishes these allegations, there would seem little room for the contention that appellants' conspiracy does not violate the Sherman Act. But irrespective of this considera-

tion, appellants have merely undertaken to show that some of the inter-related, constituent elements of their conspiracy are not in and of themselves restraints of a kind condemned by the statute. This Court, however, has rejected this artificial and essentially false test. "[T]he character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States* v. *Patten*, 226 U. S. 525, 544.

Moreover, on the facts established by the findings and evidence, appellants' elimination of competing promoters, their contracts with champions and championship contenders giving appellants exclusive promotion rights and the exclusive right to telecast and broadcast championship contests, and their engrossment of the arenas most suitable for championship fights, are unreasonable, monopolistic restraints of trade condemned by the Act even if each of these practices is considered as if it stood in isolation and independent of the over-all conspiracy of which it was an integral part.

3. On the findings and evidence, appellants unquestionably had power to exclude others from championship-fight promotion. Not only did this power flow from their elimination of all existing competitors, their contracts tying champions and championship contenders to contests promoted by appellants, and their control of all leading arenas for staging championship fights; it was also manifested by their actual control of more than 80% of all championship fights

and their 100% control of championship fights in the two most important weight divisions. It is equally clear that appellants also possessed power to control the "price" of championship fights (price of admission tickets and sales price of television, etc., rights). There obviously can never be two simultaneous or nearby-in-time championship fights in any weight division.

Respecting power to exclude competitors and power over price, championship contests constitute, as the district court found, a "separate, identifiable market," for which there is a "particular and special demand" in contra-distinction to the demand for non-title contests, on the part of promoters, boxers, spectators, television and radio stations, and sponsors of television and radio programs. Underlying and supporting these findings are numerous specific findings, and extensive oral testimony that all the foregoing interested parties viewed a championship contest as a "product" wholly distinct from, and in no sense comparable to, a non-title professional boxing contest. We submit that the record conclusively establishes that a championship contest is not "reasonably interchangeable," from a "market" standpoint, with a non-title contest—the test applied in *United States* v. *du Pont & Co.*, 351 U. S. 377, 393, 404.

In *du Pont* this Court said that, where the issue is monopolization, the relevant market varies with the kind of commerce involved, and that the factors determinative of monopoly power vary with the circumstances of each case; in other words, that the matter

calls for a particularized, primarily factual, appraisal. The holding in *du Pont* was that the district court's detailed subsidiary findings provided adequate basis for its ultimate findings of absence of possession of monopoly power. In the instant case, if the district court's findings are to be given like respect and effect, its determination that appellants possessed monopoly power, and conspired to obtain such power, in violation of Section 2 of the Act, must be affirmed.

II

It is familiar and settled doctrine that a trial court is vested with large discretion in determining the appropriate and requisite relief against those found to have violated the antitrust laws, and that an appellate court will not reject its conclusions short of a showing of abuse of discretion. It is likewise thoroughly established that the trial court's duty goes beyond preventing continuance or recurrence of the past illegal practices, and includes imposition of requirements which will, so far as practicable, undo the ill effects of the past illegal conduct.

Here the district court fashioned the judgment after extensive hearings devoted to exploration of all facts pertinent to the provisions appropriate to be incorporated in its judgment, and it enunciated as the guide to its action principles which this Court has approved and sanctioned. We submit that the district court did not act arbitrarily or unreasonably in applying these principles and did not in any respect exceed the limits of an allowable discretion.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS HAVE VIOLATED SECTIONS 1 AND 2 OF THE SHERMAN ACT

1. THE DISTRICT COURT'S DETAILED FINDINGS OF FACT, PRESENTLY UNCONTESTED, ESTABLISH THAT APPELLANTS COMBINED AND CONSPIRED TO RESTRAIN AND TO MONOPOLIZE INTERSTATE COMMERCE

Appellants contend (Br. 23–26) that they did not combine and conspire to restrain or to monopolize the trade of promoting championship boxing contests. Although thus denying conspiracy, appellants make no reference, direct or indirect, to the district court's contrary findings (Fdgs. 177–179, R. 591). They do not show, or even attempt to show, that these findings lack evidentiary support and are "clearly erroneous." On this aspect of the appeal, therefore, the holding in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, as well as in numerous other Sherman Act cases,[14] is controlling. We quote, as directly in point, the following from *Yellow Cab:*

> What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of par-

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[14] *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 330–332; *Besser Mfg. Co.* v. *United States*, 343 U. S. 444, 446–447; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596–597; *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 495–496.

> ties to certain 1929 business transactions, * * * what was the design and purpose and intent of those who carried out twenty-year-old transactions, and whether they had legitimate business motives or were intending to restrain trade of their competitors * * *. [338 U. S. at 340.]
>
> While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous." [338 U. S. at 342.]

The burden of appellants' argument seems to be that they could not have conspired to eliminate competition in the promotion and telecasting of championship fights, or to monopolize such commerce, because (a) the existing competition between the Norris-Wirtz group and the Garden was "limited and insignificant" (Br. 25) and even "non-existent" (Br. 26), and (b) elimination of Jacobs and T of C as competitors eliminated no competition "which had not already ceased to exist by the operation of economic forces" (Br. 23).

As to the alleged non-existence of competition between Norris-Wirtz and the Garden, we point out that while the prior boxing promotion activities of the Norris-Wirtz group in Chicago, Detroit, and St. Louis had been relatively limited and not financially suc-

cessful (Fdgs. 93–95, 101; R. 573–4, 575), the contracts obtained through their agreement with Louis gave them exclusive promotion and telecasting rights to a series of contests to determine the new heavyweight champion of the world (*supra*, pp. 8–9). They thereby at once obtained a commanding position in the championship-fight-promotion field and became potentially a serious competitor of the Garden, as appellants themselves recognized (*supra*, pp. 9–10). Preventing such competition was a factor motivating the formation of appellants' combination and conspiracy (*ibid.*).

As to the elimination of T of C and Jacobs as competitors, we note that appellants regarded the competition of T of C as "a major threat to our business"; that a CBS "top executive" had told Wirtz that CBS was prepared to lose a substantial sum of money backing T of C "hoping to eventually control the televising of major fights"; and that Wirtz believed that T of C "would control fights" if the Norris-Wirtz group had not made the January 1949 agreement with Louis (GX 263, R. 1529, 1531). And Jacobs, although ill and inactive at the time appellants entered upon their conspiracy, had such name and reputation in the championship-fight-promotion field that appellants desired to and did obtain his covenant not to reenter this field or to allow use of his name therein for a period of 10 years (*supra*, p. 12).

Beyond these fatal weaknesses in appellants' contention, they fail to mention in this connection other central elements of the conspiracy found by the dis-

trict court, namely, that appellants, as a part of their conspiracy, (a) entered into a series of contracts with champions and title contenders which gave appellants exclusive right to the promotion and telecasting of all their title contests (*supra*, pp. 14–15), and (b) brought under their control for the staging of major boxing contests the suitable New York arenas, and the Chicago, Detroit, and St. Louis arenas most suitable for this purpose (*supra*, pp. 13–14).

2. THE CONSPIRACY WAS IN UNLAWFUL AND UNREASONABLE RESTRAINT OF TRADE

Appellants contend (Br. 19–23) that their conspiracy is not in unreasonable restraint of trade.[18] The prior decision by this Court that the complaint in this case states a cause of action (*United States* v. *International Boxing Co.*, 348 U. S. 236, 245), followed by the district court's determination that the evidence establishes all the allegations of the complaint, would seem to leave little room now for the contention that the combination and conspiracy charged and found against appellants does not violate the Sherman Act. But even apart from this consideration, we submit that the contention is without merit.

The unspoken premise of the contention is that, in determining whether appellants' conspiracy was in unreasonable restraint of trade, the conspiracy is not to be viewed as a unitary whole, but the test to be applied is whether each aspect of restraint is as a matter of

[18] Their defenes to the finding of conspiracy to monopolize is grounded on the allegedly erroneous determination of the relevant market made by the district court, a contention which we discuss in the next Point of the brief, *infra*, pp. 30–40.

law in and of itself of a kind condemned by Section 1 of the Sherman Act. In effect, appellants ask the Court to disregard the nature, purpose and effect of the over-all conspiracy, and urge that its legality be determined by considering the legality of each interrelated, constituent element as if it stood in isolation. Such an artificial and essentially false test has been rejected by this Court.

In *United States* v. *Patten*, 226 U. S. 525, 544, the Court said: "It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." In *Swift & Co.* v. *United States*, 196 U. S. 375, the Court, in holding that the Government's complaint charged a violation of the Sherman Act, said (p. 396):

> The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.

The rule laid down in *Swift* and *Patten* is equally applicable where the facts as to the over-all conspiracy and its component elements are not complaint allegations standing admitted but facts established at trial.

United States v. *Reading Co.*, 226 U. S. 324, 357–358.

We nevertheless comment briefly on certain of appellants' contentions respecting the reasonableness of particular restraints. They suggest (Br. 19) that elimination of Jacobs and T of C as competitors did not violate the statute because they were "dying organizations," and that, under *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, elimination of these competitors did not violate "the anti-trust law." But the cited decision merely held that acquisition of a company facing the grave probability of involuntary liquidation because of its insolvency, and "not with a purpose to lessen competition," did not tend to "substantially lessen competition" in violation of Section 7 of the Clayton Act as it then stood. 280 U. S. at 300, 302–303. The decision, therefore, patently has no application to the T of C acquisition.

Prior to appellants' combination, T of C's major stockholder was prepared to have it incur operating losses, in a long-range endeavor to obtain a secure position in the promotion of major boxing matches (*supra*, pp. 12–13, 25). The fact that T of C may have been willing to sell its stock to the Garden after appellants' combination had closed most of the avenues to successful promotion shows that it was primarily their combination, rather than outside economic forces,

which brought about its elimination as a competitor."[16]

The series of contracts by which appellants tied to themselves champions and title contenders completely excluded others from the championship-fight-promotion field. By this practice, once the current champion had been tied to a contract giving appellants exclusive promotion rights, no one could succeed to his title without becoming similarly bound (*supra*, pp. 14–15). The practice gave appellants control of promotion of championship contests in perpetuity."[17] We believe that no court has held exclusive contracts having this monopolistic purpose and effect to be valid under the antitrust laws.

Appellants' suggestion (Br. 21) that the exclusive contracts served a "legitimate business need" would, even if true, give them no antitrust immunity. Furthermore, there was no legitimate business need

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[16] Since the Garden paid $100,000 for the stock of this so-called "dying organization" and gave it 25% of the net profits of the next two middleweight championship contests promoted by appellants (*supra*, pp. 12–13), appellants clearly attached high value to elimination of this competitor.

[17] After they obtained from Louis the exclusive contracts for the title contenders for the heavyweight championship, and obtained from T of C exclusive contract for the middleweight championship, they thereafter promoted every heavyweight and middleweight title contest during the period June 1, 1949–May 15, 1953 (GX 4B, R. 958). And appellant Norris admitted that after he secured his "first exclusive contract in the welterweight division * * * [he] promoted all of the welterweight title bouts that were presented in the United States" (R. 351–352).

for the contracts. Appellants state the need as follows (Br. 21):

> In order to present a series of attractive programs to build up the required continuity of attendance or viewing habit and to fulfill the obligation to present fight programs weekly under the broadcast agreements, there was a need to have a source of outstanding boxers available whose services could be called upon for a particular program.

None of the foregoing considerations applies to championship contests, which are presented only "[a]s they come up" from time to time (R. 381–2), are negotiated outside of weekly boxing series (R. 378–81, 400), and do not "provide continuity to a television advertising program" (Fdg. 83, R. 571).

Appellants contend (Br. 22–23) that their engrossment of arenas suitable for championship fights is not to be deemed an unreasonable restraint because some of their exclusive leases came to an end after two or four years and because they did not engross every possible suitable arena. Both grounds are, we submit, patently irrelevant to the question whether their restriction of outlets essential to the promotion of championship fights was in illegal restraint of trade.

3. APPELLANTS, BY COMBINING AND CONSPIRING TO OBTAIN DOMINION OVER, AND POWER TO EXCLUDE OTHERS FROM, PROMOTION AND TELECASTING OF CHAMPIONSHIP BOXING CONTESTS, AND BY ACQUIRING AND RETAINING SUCH DOMINION AND POWER, CONSPIRED TO MONOPOLIZE AND MONOPOLIZED A "PART" OF INTERSTATE COMMERCE IN VIOLATION OF SECTION 2 OF THE ACT.

It is settled that there is a monopolization prohibited by Section 2 of the Act when there has been intentional acquisition or retention of "the power to

control prices or exclude competition." *United States* v. *du Pont & Co.*, 351 U. S. 377, 391, and cases there cited. On the district court's findings, there can be no possible doubt that appellants had this power as to promotion of championship contests.

By the exclusive contracts exacted of would-be contenders for a championship title, and to a lesser degree by their control of the arenas best suited for staging such contests and their elimination of specific competitors, appellants unquestionably possessed power to exclude others from championship-fight promotion. The terms of the conspiracy, as carried out, gave power of exclusion, and, in actuality, appellants controlled the promotion of more than 80% of all championship fights (*supra*, p. 15) and 100% of the two most important weight divisions, heavyweight and middleweight (*supra*, p. 29). In *American Tobacco Co.* v. *United States*, 328 U. S. 781, the Court held that those who had at least 68% of national cigarette production during a nine-year period might properly be found guilty of a conspiracy to monopolize, and that this offense exists if there is power and intent to exclude competition "to a substantial degree." 328 U. S. at 795, 797, 798.

In the championship-boxing-promotion field, power over price is a necessary concomitant of power to exclude. "Price" here means the price of admission tickets and, perhaps more important, the sales price of television, broadcasting and motion-picture rights. By the very nature of the "commodity" sold, it has no concurrent counterpart—in any weight division there

necessarily is a substantial time lag between one championship fight and the next. Of course, the promoter's price (whether from sale of admission tickets or from sale of television, etc., rights) is limited by the fact that he cannot obtain a price above "what the traffic will bear." But the same economic limitation governs the price charged by any monopolist. From the legal standpoint of determining monopoly power over price, the sole relevant consideration is whether the alleged monopolist of a particular product is denied power to fix or raise its price because of the presence in the market of other products having reasonable interchangeability with it—price, use and qualities considered. See *du Pont*, 351 U. S. at 404.

Appellants rely on the statement in *du Pont* that, in determining possession of forbidden monopoly power, the relevant market to be considered embraces the commodities which are "reasonably interchangeable by consumers for the same purposes." 351 U. S. at 395. But, on the evidence and the district court's findings, a non-title professional boxing match is not, from any point of view, "reasonably interchangeable" with a championship match.[18] This is established by numerous undisputed specific facts found by the district court.

Appellants' receipts from the championship fights which they controlled averaged almost four times their receipts from non-title bouts which they promoted in

[18] Perhaps one in one thousand or in several hundred non-title boxing contests is so interchangeable, but these rare and exceptional instances do not negative possession of monopoly power over price in the championship-fight field.

principal arenas (Fdg. 51, R. 567). They sold radio and television rights to a championship fight for $100,000 and sold the same rights to a non-title fight between the same contestants, held seven months later, for less than half this sum (Fdg. 52, R. 567). They sold motion-picture rights to six championship contests for more than $600,000 and in no instance sold full length motion-picture rights to a non-title contest (Fdg. 63, R. 569). The Nielsen Average Audience television rating for championship fights was approximately 30% higher than its rating for non-title contests (Fdg. 54, R. 567).[19] Spectators pay substantially more for admission tickets to championship contests than for tickets to non-championship contests (Fdg. 66, R. 569).

The district court found that among boxing promoters, broadcasting and telecasting stations, sponsors of television and radio programs, spectators, and boxers, a "particular and special demand" exists for championship contests in contradistinction to non-championship fights (Fdgs. 66–67, R. 569). It found that, for all of these parties, there exists a "separate, identifiable market" for world championship contests (Fdg. 67, R. 569).

Appellants assert (Br. 16) that the sole basis of these findings is a "statistical averaging of various facts," and contend (Br. 17, 18) that the court's "separate market" findings are therefore "artificial, unrealistic and unreliable." We submit that the so-called

[19] This rating is the percentage of the total residential television sets in the area in which the program is telecast which are found to be tuned in to a program (Fdg. 53, R. 567).

statistical facts amply support the court's finding, which should not be set aside unless shown to be "clearly erroneous." The supporting evidence, however, is not confined to statistical facts. It includes evidence, primarily oral testimony, by those intimately acquainted with the industry.

One expert witness, Abe J. Greene, former president of the National Boxing Association (R. 203), testified that it would "certainly" be "commonly accepted" that there is a "separate market" and a "seperate public demand" for "championship contests" (R. 220). He characterized championship boxing contests as "outstanding" and "the cream on the milk" (R. 220, 222). He and others stated that they corresponded to the World Series (R. 220, 379), the Kentucky Derby (R. 401–2), and the professional football playoffs (R. 379). For the boxers themselves, a title bout represents "the peak of all ambition" and "their arrival at Mt. Olympus" (R. 205).

Championship contests also have unique spectator appeal since "many people * * * go to championship bouts who don't go to the ordinary show" (R. 221). The former attract more spectators and the tickets are uniformly more expensive (R. 221, 352). Likewise, promoters recognize the distinctive character of championship contests. Appellant Norris, in testifying concerning the approach made to him for purchase of the right to stage in Cincinnati one of the championship fights covered by the exclusive contracts obtained from Louis, said (R. 319):

> The fight—as far as we were concerned, there was no price on it, whether it was ten cents or

> $300,000. It was a prestige thing for the IBC. It was their first fight, a heavyweight championship match, our first fight, and we wanted to promote it in Chicago.

The undisputed evidence that appellants' exclusive contracts with boxers covered only championship fights, and that it was only these contests which they allocated between IBC (Ill.) and IBC (N. Y.), further shows that they regarded title contests as being on a different and separate plane from non-title contests.

A vice-president of the Gillette Safety Razor Company, one of the most important sponsors of television and radio sports programs, testified that a title fight has "a unique value from the point of view of advertising" (R. 393, 404). The sponsor of the Garden's Friday night boxing series paid $200,000 for sponsorship of a single heavyweight title contest because he wished to get "the biggest possible audience" at the start of the series and because he thought that spending a lot of money for newspaper advertising and publicity might not accomplish as much as "by starting off with a championship fight" (R. 377).[20]

Network radio and television chains had a like view of the unique value and character of title contests. A vice-president of CBS stated that it bought an interest in T of C in order to obtain television and radio rights to "the good fights" and "championship fights in particular" (R. 137). He stated that

[20] Another leading sponsor of such television programs testified that it would pay more for a championship contest than for a contest, engaged in by the same champion, which was not a championship fight because not subject to the weight limitations of the champion's weight division (R. 391).

these contests "are important as special events, as audience-getters," and that a non-championship contest is not a "special event" of this kind (R. 136).

A "commodity" in which there is an inherent prestige element, incalculable in terms of dollars and cents (*supra*, pp. 34–35), and which all those concerned in the business regard as being in a class by itself, falls wholly outside the holding in *du Pont*—where the district court found there was reasonable interchangeability, in the respects significant to monopoly power, between cellophane and other flexible packaging materials. Appellants, in short, had power to exclude others and power to control price in a part of trade and commerce which the court below found, on ample evidence, to be in a wholly different category from the trade and commerce involved in promoting non-title professional boxing contests. We submit that it approaches the fantastic to assert "reasonable interchangeability" between promoting title contests, of which there were 44 between June 1, 1949 and May 15, 1953 (Fdg. 63, R. 569), and promoting non-title contests, of which there were some 8000 during this period.[21]

The "market" to be studied to determine whether a producer has monopoly power "will vary with the part of commerce under consideration" (351 U. S. at 404), and the factors determinative of such power vary with the "circumstances of each case" (*id.* at 395). The decision in *du Pont* was bottomed on find-

[21] It was estimated that there were 2,000 non-title professional boxing contests in 1951 (R. 430).

ings of the district court furnishing, in the view of this Court, adequate basis for the district court's ultimate findings of absence of monopoly power. 351 U. S. at 397–412. In the instant case the district court's ultimate findings of possession of monopoly power are bottomed on uncontested detailed findings of fact as well as a wealth of oral testimony directly supporting the ultimate findings. We submit that *du Pont*, to the extent that it is relevant, requires affirmance of the district court's adjudication of violation of Section 2.

We note that, in still another respect, the decision in *du Pont* points toward affirmance of the adjudication here under consideration. In *du Pont* the sole issue before this Court was monopolization; conspiracy to monopolize and attempt to monopolize were not in issue. The Court in that case stated that in conspiracy and attempt to monopolize cases it had often applied Section 2 of the Act to producers of single products and to businesses of limited scope. 351 U. S., note 23 at 395–396. Since the Court regarded these precedents as not applicable when the sole issue was monopolization, it necessarily held that there is a distinction between monopolization, on the one hand, and conspiracy or attempt to monopolize, on the other hand, as to the market determinative of possession of monopoly power.[22] The instant case, where both con-

[22] There would seem to be sound basis for such a distinction. Where the would-be monopolist has conspired or attempted to bring under his control a particular area of trade, his own conduct constitutes an appraisal that, if he can attain this end, outside competitive forces will not negate exercise of monopo-

spiracy to monopolize and monopolization have been found, is therefore governed by the decisions applying Section 2 to single products or businesses of limited scope.

The decision which is decisive here is not *du Pont* but *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131.[22] In *Paramount* the district court had found that the five major defendants did not have the purpose to achieve a "national monopoly" in the exhibition of motion pictures and that they did not, collectively or individually, have a monopoly of exhibition. 334 U. S. at 171. This Court held these findings deficient in that there was no finding as to the presence or absence of monopoly on their part "in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities." *Id.* at 172. "Yet," said the Court, "the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases." *Id.*, at 172–173. The cause was remanded to the district court for the purpose, among other things, of making the findings stated as not having been made, and which could be of importance only if monopolization in the limited fields indicated would violate Section 2 of the Act. And after the district court had found that the five major defendants had power to exclude competition

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listic power. But specific intent of this kind is not an element of the offense of monopolization, and there is then lacking the guidepost furnished by the defendant's own conduct.

[22] See also the cases cited in *du Pont*, 351 U. S., note 23 at 395–396.

in the markets constituting first-run exhibition in the country's 92 largest cities (85 F. Supp. 881, 894), the judgment which it entered based on this finding was affirmed by this Court (339 U. S. 974).

Championship boxing contests are likewise the "cream" of the business which appellants conspired to monopolize and monopolized. We submit that *Paramount* is decisive on the "relevant market" issue.

Appellants' reliance (Br. 15–18) upon *Times-Picayune* v. *United States*, 345 U. S. 594, is, we submit, misplaced. In that case the publisher of the sole morning newspaper in New Orleans also published an afternoon paper which competed with another New Orleans afternoon paper, and the question was whether the publisher violated the Sherman Act when it refused to sell space for certain kinds of advertising in the morning paper alone, and sold space only for advertising to appear in both its morning and its afternoon paper. This Court held that what advertisers were buying was access to newspaper readers; that the readers, morning or afternoon, were "fungible customer potential"; and that readership bought in the morning paper was the "selfsame" product as readership bought in the afternoon paper. 345 U. S. at 613. Accordingly, it was held that, for the purposes of the case before the Court, there was no morning newspaper market separate and distinct from an afternoon newspaper market, and no illegal monopolization or unreasonable restraint of trade was established. The decision is inapposite here both be-

cause it involved no product having unique "prestige" value and because championship boxing contests and non-title contests are not, in any "market" sense, the "selfsame" product. Moreover in *Times-Picayune* the Court confined its decision to "the narrow record before it." *Northern Pacific R. R.* v. *United States*, 356 U. S. 1, 10.

II

THE PROVISIONS OF THE JUDGMENT ARE WELL WITHIN THE DISCRETION VESTED IN A TRIAL COURT IN FRAMING THE RELIEF APPROPRIATE AND NECESSARY AGAINST THOSE ADJUDGED TO HAVE VIOLATED THE SHERMAN ACT

The general principles which should govern a trial court in framing an antitrust decree, and the principles governing appellate review of its judgment, are well settled. "The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court." *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 89. In civil antitrust proceedings, district courts are "invested with large discretion to model their judgments to fit the exigencies of the particular case" (*International Salt Co.* v. *United States*, 332 U. S. 392, 400–401), and this Court "will not direct a recasting of the decree except on a showing of abuse of discretion" (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185). In determining the scope of the decree, "doubts should be resolved in favor of the Government." *Local 167* v. *United*

States, 291 U. S. 293, 299; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409.

The district court has the initial duty to extirpate the offending practices and to compel surrender of the fruits of illegal activity, but this marks the beginning rather than the end of the court's exercise of its remedial powers. *Schine Chain Theatres* v. *United States*, 334 U. S. 110, 129–130. The trial court, having found violation of the Sherman Act, has the duty to compel action "that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance," and the court's powers are "not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal." *U. S. Gypsum*, *supra*, at pp. 88–89. A public interest served by the Government's civil antitrust proceedings is that they "effectively pry open to competition a market that has been closed by defendants' illegal restraints", and if the judgment "accomplishes less than that, the Government has won a lawsuit and lost a cause." *International Salt*, *supra*, at p. 401.

With reference to the judgment provisions, appellants initially make the blanket statement (Br. 26) that the district court "ignored completely 'existing conditions.'" In support of this broad assertion appellants merely state that they were not utilizing at the time of judgment all of the means employed in effecting their monopolistic control and restraint of trade (Br. 26–27). This is an assertion, not that the court disregarded existing conditions, but that it con-

cluded that the relief embodied in its judgment was required notwithstanding this kind of change in conditions. Appellants even support the alleged disregard of "existing conditions" by a statement of what has occurred *subsequent* to entry of judgment (Br. 27)—a matter not only not of record but also without significance absent proof of all relevant circumstances.

Appellants' charge that the district court ignored existing conditions when framing its decree is the more extraordinary in view of the lengthy hearing respecting the terms of the judgment, held more than a year after the close of the trial on the merits (*supra*, p. 4). At this hearing the court expressed its willingness to accept, and it did accept, "evidence as to existing conditions in the industry" and "economic consequences" of proposed judgment provisions (R. 774–5). Appellants' witnesses testified extensively on these and other questions, including the feasibility and fairness of various proposed remedies.

Appellants further make the general charge that the "decree was harsh beyond all reason" (Br. 28). Whether this charge has any basis depends upon whether appellants can show lack of "reason" for the judgment provisions to which they object. We now turn to their attack on particular provisions.

(1) DIVESTITURE

The judgment requires that Norris and Wirtz, within five years from the date of entry of final judgment, sell or cause to be sold all capital stock of the Garden which they own or control, directly or indirectly, to a person or persons approved by the court (R. 909). It

further provides that, pending such sale, Norris and Wirtz shall transfer these stockholdings to two court-appointed trustees (*ibid.*). Their duties are to exercise all voting rights in the transferred stock; immediately distribute any dividends received by them to the equitable owners; and, as to any stock remaining unsold at the end of five years, sell this stock within two years thereafter and distribute the proceeds to the equitable owners; and they are entitled to reasonable compensable compensation for their services, as approved by the court, chargeable against the dividends or proceeds of sale passing through their hands (R. 909–10). Other allied requirements are that Norris and Wirtz acquire no additional stock or financial interest in the Garden, and resign as directors and officers of the Garden and not thereafter hold these positions (R. 910–1).

If divestiture is an appropriate remedy in this case, the terms for effectuating it certainly were not harsh or punitive. The five-year period for making the required sales, plus a further two-year period, afford Norris and Wirtz full opportunity to realize on the value of their Garden stock.[26] The trustees' reasonable compensation for their services, to be approved by the court, payable out of dividends received of proceeds of sale, represents a very trifling financial burden. Antitrust decrees providing for trusteeing stock pending sale thereof as required by the judgment, with the trustee's compensation charged against the

[26] Any ambiguity as to whether certain stock is "indirectly" owned or controlled within the meaning of the judgment can be readily resolved by an application to the court, under paragraph 25 (R. 914–5), for construction of the judgment.

owner of the trusteed stock, have ancient precedent."[9]

In the course of the relief hearing, the court said: "The great evil I found was the combination that Wirtz and Norris caused and created by joining up with Madison Square Garden" (R. 821). At the conclusion of the hearing the court observed that prior to 1949 the Norris-Wirtz group in Chicago and the Garden in New York were "two separate entities," one promoting contests in the Mid-West and the other in New York (R. 876); that "in order to destroy this monopoly we have to return the situation as nearly as possible to the economic conditions as they existed in 1949" (R. 877); that "I can see no way in this case, the longer I ponder over it, no way that a proper decree can be formulated unless that power that Wirtz and Norris have in Madison Square Garden is curtailed. They have to get out of the control" (R. 878–9).

Conditions shown at the hearing confirmed the need to dissolve the still-existing and functioning combination. The evidence showed that IBC (Ill.) and IBC (N. Y.) still shared equally the profits of championship boxing contests pursuant to "an unwritten understanding" (R. 732, 736, 757);[10] that the "work" of the IBC's "has continued pretty much the same way" as before (R. 728), and that the combination

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[9] *E. g., United States* v. *Union Pacific R. R. Co.*, 1 Decrees & Judgments in Civil Federal Anti-Trust Cases 208, 231 (1913); *United States* v. *Reading Co.* (*id.*, 575, 606 (1921)); *United States* v. *Lehigh Valley R. R. Co.* (*id.*, 687, 711 (1923)).

[10] The sharing of profits also included revenues from championship contests promoted by others but televised on appellants' weekly boxing series (R. 736–7).

still rested upon interlocking officers and directors, Norris being president of the Garden IBC (N. Y.), IBC (Ill.), the Chicago Stadium, and he and Wirtz being directors of all four corporations (R. 892).

"Dissolution of the combination will be ordered where the creation of the combination is itself the violation." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189. In decisions covering a span of more than fifty years, this Court has upheld divestiture of capital stock or physical assets as a necessary and appropriate means of dissolving an unlawful combination and dissipating its anticompetitive effects."[27]

Plainly the district court could reasonably conclude that merely prohibiting exclusive contracts and leases (see App. Br. 27–28), or temporarily limiting the number of championship fights which appellants may promote (see *id.* 34–35), would fall short of providing adequate relief. Such prohibitions, standing alone, would do no more than proscribe particular methods employed in effectuating appellants' illegal combination. In many situations, of which this is one, "an

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[27] For early cases, see *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

For more recent decisions, see *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.*, v. *United States*, 323 U. S. 386; *United States* v. *National Lead Co.*, 332 U. S. 319, 363; *United States* v. *Paramount Pictures*, 334 U. S. 131, 151–153, 174–175.

injunction against future violations is not adequate to protect the public interest."[28] *Schine Chain Theatres* v. *United States*, 334 U. S. 110, 128; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 190.

Stock divestiture is also essential to put Norris-Wirtz and the Garden at arms' length in carrying on championship-fight promotion, and to sever all financial and managerial ties between them. In this case, as in *Crescent, supra:*

> Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. [323 U. S. at 189–190]

It is immaterial that Norris and Wirtz obtained much of their Garden stock before the conspiracy. Even if stock holdings have been lawfully acquired, "they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event

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[28] Appellants are now so well entrenched in the business of promoting title contests that exclusive contracts with boxers may no longer be needed to maintain their control. They have not, since 1955, signed any new exclusive contracts of this kind and had only two such contracts at the time of the hearing on relief in May 1957 (R. 805), but they had controlled television rights to all of the 11 championship fights held between the spring of 1956 and the spring of 1957 (R. 807).

divestiture would likewise be justified." *Paramount Pictures, supra,* at 152. The district court having found that appellants' combination rested on "stock ownership and control of stock voting power" (R. 891), and that stock divestiture will "effect a major step toward undoing the illegal combination" (R. 894), its divestiture order was warranted.

(2) DISSOLUTION OF IBC (ILL.) AND IBC (N. Y.)

The district court ordered dissolution of the two IBC's (R. 913–4). Appellants characterize this as "hari-kari" and imposition of the "death penalty" (Br. 28, 29), but make no showing of hardship. As reasons for dissolution of the two IBC's, the court in its opinion on relief said (R. 896):

> These corporations are the promotional arms of the defendants, conceived and used to enable defendants to restrain and monopolize promotion of championship boxing contests. Their assets are of but nominal value except for the goodwill attaching to their names by virtue of the conspiracy.

Their dissolution afforded a simple and convenient alternative to judgment provisions cancelling numerous agreements and understandings (some of them unwritten, R. 732) developed with the conspiracy and to which the IBC's were a party (R. 868–73). No showing has been made which warrants setting aside the required dissolution of IBC's.[29]

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[29] Dissolution of a corporation which had been the focal point of the antitrust conspiracy was ordered in *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass.). In the *Hartford-Empire* litigation, dissolution of a corporate

(3) COMPULSORY LEASING

The court decreed that for five years the Garden shall lease its premises at a "fair and reasonable" rental to any duly qualified promoter applying in writing for the staging of a championship boxing contest on a specific day, provided that the Garden is not under lease to another for the date selected and that the requested lease does not conflict with any "well-established event" regularly conducted at the Garden (R. 912). If the parties are unable to reach agreement on terms, the matter is to be submitted to the court (*ibid.*). The same five-year requirement was imposed as to the Chicago Stadium so long as it is controlled by Norris and Wirtz or either of them (R. 912–3). The district court initially proposed such a provision (R. 738–40) after the New York State Boxing Commissioner had urged that the Garden be made available to "small club promoters" who do not otherwise have available facilities for a title contest (R. 657–8, 674).

This Court has repeatedly upheld antitrust judgments requiring the licensing of patents at reasonable royalties, with court determination of the royalty in the event of dispute. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 417; *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 93–94; *United States* v. *National Lead Co.*, 332 U. S. 319, 348–51. It has

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antitrust violator was considered although not decreed, but the court's power to grant such relief was not questioned. *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541, 620 (N. D. Ohio). See also *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 408; 324 U. S. 570, 574–575.

also affirmed provisions of antitrust judgments requiring lease or sale of property on fair and reasonable terms. *International Salt, supra,* at 398–399; *Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 447. We submit that the compulsory leasing requirements of the judgment constitute a form of relief approved by this Court, and that they are an appropriate measure to "pry open to competition a market that has been closed by [appellants'] illegal restraints." *International Salt,* at 401.

(4) PROHIBITIONS APPLICABLE TO NONCHAMPIONSHIP CONTESTS

The prohibition of the judgment against exclusive contracts with boxers (R. 907), and its prohibition against leasing an arena upon terms which would bar its lease by another for the staging of a professional boxing contest (R. 908), apply to all professional boxing contests. The court, in explanation of these prohibitions, said (R. 896):

> The relief here must be broader than the championship field because the evil to be remedied is broader. By terminating all exclusive contracts and leases and enjoining them in the future, the way will be open for those who wish and have the financial ability and otherwise meet local and state requirements to enter into the promotion of championship boxing contests.

It is plain that if appellants were allowed to continue their exclusive practices, while engaged in promoting non-title contests, the resulting ties[9] to appellants would at least hinder others in gaining entry to the championship-boxing-promotion field. The court, having found that there was need for prohibitions reach-

ing beyond the conduct directly adjudicated illegal, acted within well-settled principles in granting the broader relief which it deemed necessary (*supra*, p. 45).

The prohibition against exclusive contracts with boxers bars, for a five-year period, exclusive rights to a return bout (R. 908). Appellants attack this prohibition as "unnecessary and unwarranted" (Br. 35). A contract giving sole right to promote a return bout or bouts is an exclusive contract even though its scope is limited, and the district court might properly conclude that, for five years, appellants should not be permitted to tie boxers to exclusive contracts of any nature. We also take issue with appellants' statement (Br. 35) that the New York and Illinois Boxing Commissioners testified to the desirability of such exclusive contracts.[30]

(5) OPTIONS

Appellants contend (Br. 36–39) that the district court erred in failing to give them a choice between the divestiture which it decreed and certain other prohibitions or requirements. Of the options stated

[30] The New York Commissioner merely said that he thought "there is considerable justice in the demand of a champion to the right of a return bout," but that any return bout contract "should be limited to one return bout at the most, and that within a reasonable time" (R. 655), and that he believed that such a contract is "fair to the promoter" (R. 675). The Illinois Boxing Commissioner testified that in his opinion an exclusive contract between a promotor and a boxer for six months "would not be restrictive in an improper sense at all" (R. 691), but he also testified that a "return bout clause has an adverse effect economically on the boxing industry" (R. 692).

as having been requested (Br. 37–38), the only one pressed in the district court and argued here is that, in lieu of the decreed divestiture, the Garden be enjoined from promoting championship boxing. A judgment so providing would have eliminated the country's principal promoter of championship boxing contests (*supra*, p. 7), with the probable effect of centering promotion of these contests in Chicago under the control of Norris and Wirtz. Clearly it was not error for the court to refuse to give appellants the option to choose between the suggested prohibition and the judgment's divestiture provisions, which the court viewed as being the core of effective relief.

Finally, we point out that the judgment provisions represent the considered conclusions reached by the district court, based on intimate knowledge obtained at trial as to the nature and effects of appellants' monopolization of and restraints upon the promotion of world championship boxing contests. The appropriateness of each judgment provision to which appellants object is to be measured against what the court said in its opinion on relief (R. 896–7):

> The Court desires to note that the relief to be afforded is required by the facts of this suit. Championship boxing was regarded by defendants as a business, engaged in solely for profit. For these profits defendants were bent upon a plan of monopolization to exclude all competition and leave them free to reap financial gain. The extent of defendants' activities in this illegal conspiracy requires drastic affirmative action by this Court.

The relief outlined herein is designed to put an end to the conspiracy; to deprive defendants of their present position in the market, which was attained through the conspiracy, and to destroy the monopoly which they created and seek to perpetuate. Professional championship boxing contests will be opened with television and radio broadcasting to legitimate and healthy competition.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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